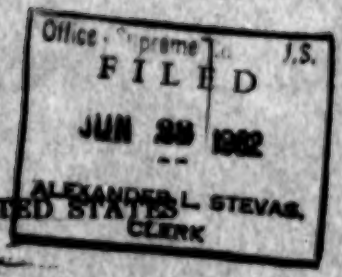

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-2165

KENNETH M. M.,

Petitioner,

v.

CLAIRE A. M.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Bertram S. Halberstadt
Lindh & Halberstadt
Suite 570
One Customs House Square
Wilmington, Delaware 19801
Attorneys for Respondent

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OPINIONS BELOW

1. September 28, 1979 Delaware Trial Court Decision:

The Delaware Family Court entered an opinion

and order dividing the parties' marital property. (Appendix pp. A-1-12 to the Petition for a Writ of Certiorari, is cited as A-__. Respondent's Appendix reference is RA-1.) This decision and three later orders related to the property division were appealed by petitioner to the Supreme Court of Delaware, designated as Supreme Court Nos. 305, 326 and 346 (1979) and 247 (1980).

On November 3, 1980, the Delaware Family Court entered a contempt order based upon petitioner's failure and refusal to comply with that Court's prior property division order. This order was appealed by petitioner to the Supreme Court of Delaware, designated as Supreme Court case No. 284 (1980).

2. February 23, 1982 Supreme Court of Delaware Order:

Petitioner's five appeals were consolidated and ruled upon in the Supreme Court of Delaware's Order of February 23, 1982. (A-14-24.) The property division orders (excepting that order relating to "miscellaneous personal property") were affirmed. The contempt order was reversed.

QUESTION PRESENTED

Whether this Court should grant certiorari to the Supreme Court of Delaware to review its order affirming the trial court's property division order where petitioner was able, despite a partially defective transcript, to fully argue all meaningful issues sought to be raised on appeal, and where the trial court judge's display of annoyance did not amount to personal bias or prejudice.

COUNTERSTATEMENT OF THE CASE

This marital property division case involves a unique, complicated and highly acrimonious personal dispute between former spouses. (A-4, 5, 18, 21.)[1] Respondent Claire A. M., now age 55, suffers from several diseases which render her physically disabled. (A-2.) Petitioner Kenneth M. M., now age 42, is, in contrast to Claire, highly educated, in excellent health and far exceeds Claire in his present and future capacity for amassing income. (A-2, 12.)

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1. The sole record before this Court consists of the Delaware Family Court and Delaware Supreme Court opinions below (A-1-24) and Questions Raised by Petitioner Before the Delaware Supreme Court (RA-1).

A property division hearing was held during 30 evening hours in May and June, 1979. Because the trial judge fully anticipated appellate review, he intentionally described in his opinion the litigants' behavior during the property division hearing. That behavior provided the trial judge with ". . . some of the worst moments I have spent in a courtroom." (A-4, 5.) The trial judge had to tolerate the parties' continual and serious breaches of court room decorum and "chaos which has been created either deliberately or by non-preparation of the litigants." (A-5.) The judge's annoyance with this behavior was reflected in action not against petitioner, but only against respondent, who was fined $500 for contempt of court. (A-4.)

In the Supreme Court of Delaware, petitioner raised and fully argued seven points pertinent to the trial court's property division decision.[2]

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2. An eighth argument related only to the contempt order against petitioner made 17 months after trial. While petitioner states that he wishes a reversal of the Delaware Supreme Court judgment (Petitioner's Brief in Support of the Petition for a Writ of Certiorari, 28), his petition is directed to the adverse property division rulings and not to the separate and successful contempt appeal below.

The Delaware Supreme Court held that the trial court's management of the case and evidentiary rulings were a proper exercise of its discretion. (A-18-21.) The Delaware Supreme Court also held that the merits of the property division [except the personal property ruled upon ten months after the trial (A-22)] were decided in a "patently reasonable" and "entirely proper" manner. (A-21-22.)

Petitioner also argued below—and now argues—that the trial transcript of the property division hearing was inadequate for appellate review and that the trial court had a predisposition or bias against him. The Delaware Supreme Court found such arguments to be without factual or legal merit (A-15-16), but criticized the trial court for its displayed lack of patience and judicial temperament. (A-17.)

Neither petitioner's Statement of the Case nor his Appendix states when, where or how any federal question was raised or passed upon below.[3] Petitioner

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3. The issues petitioner did raise and argue are set forth at RA-1.

does not quote the record to establish that a federal question was timely and properly raised or passed upon below. See Rule 21.1(h) of this Court.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO FEDERAL QUESTION WAS RAISED BY PETITIONER AND PASSED UPON IN THE DELAWARE COURTS.

A. This Court does not grant certiorari to a state court where the federal question or constitutional issue presented had never been raised and passed upon in the courts below. **Cardinale v. Louisiana**, 394 U.S. 437 (1969). As a result, this Court lacks jurisdiction under 28 U.S.C. §1257(3) to review the rulings below where the assertion of constitutional issues arises, as here, for the first time. Id., at 438-439.

Petitioner's federal questions are raised here by bare assertions, without even a contention, much less a showing, that they were raised and passed upon below. Petitioner makes no record reference to the jurisdictional criterion. See **Department of Mental Hygiene v. Kirchner**, 380 U.S. 194, 197 (1965) (Petitioner's burden

to establish jurisdiction by clear showing of federal question raised and decided below) and Rule 21.1(h).

Even if the federal questions presented were properly brought to the attention of the lower court—which cannot be gleaned from the closest scrutiny of the Delaware Supreme Court's opinion—it is clear that the Delaware Court did not rely, reach or rule upon any constitutional issue.

B. The decision below was based upon issues of state law and was correctly reached.

The sole and correct standard for determining whether a trial transcript is adequate for appellate review is whether the transcript, taken as a whole, prevents an appellant from raising the relevant grounds of appeal or disables the appellate court from deciding them. **Kent v. County of Hudson**, N.J. App., 234 A.2d 489, 491 (1967). (A-15.) The Court below, having reviewed all of the grounds for relief advanced by petitioner and the entire transcript, held that the transcript ". . . fully lays the basis for meaningful appellate argument. Consequently, general reversal on this ground is not warranted." (A-15.)

Petitioner now asks this Court to make another review of the voluminous trial transcript to see whether it can find what the Supreme Court of Delaware was utterly unable to find—that having raised the seven non-constitutional issues passed on by the Supreme Court of Delaware after 78 pages of briefing and full oral argument, petitioner was deprived of his ability to argue the pertinent issues on appeal and the Delaware Court was deprived of its ability to determine those issues. This Court should not and need not be rummaging through a trial transcript which the Delaware Supreme Court found to be factually and legally adequate.

As to petitioner's "bias or prejudice" contention, based upon adverse rulings and the trial judge's displayed annoyance with both parties and counsel, the Delaware Supreme Court first reviewed the entire record before it. That voluminous record included no less than 63 docket entries, more than 80 documents, 305 pages of appendices, 146 pages of briefs and almost 1,000 pages of transcript. The Supreme Court concluded that there

was not one "particular ruling, order or act on the part of the court that was inherently unfair or hostile to [petitioner]" (A-16; emphasis supplied). The trial judge's display of annoyance never "prevent[ed] him from fully and impartially considering all aspects of the case." (A-17.) The court therefore held that there was no factual or legal basis for the claim of personal bias or prejudice. See **Cavanaugh v. Cavanaugh**, R.I. Supr., 375 A.2d 911, 917-18 (1977). (A-17.)

Petitioner now asks this Court to again review the same record (which petitioner chose not to make part of the record before this Court) to reevaluate the Delaware Supreme Court's factual determinations that every one of the trial judge's rulings was fair and made without personal hostility and that the trial judge's annoyance (however provoked) did not prevent an impartial consideration of all aspects of the case.[4]

---

4. The Delaware Supreme Court's criticism of the trial judge's "lack of patience and judicial temperament" (A-17) was directed to the trial judge personally and did not affect the Supreme Court's conclusion as to the absence of personal bias or prejudice.

II. THE QUESTIONS PRESENTED BY PETITIONER DO NOT WARRANT REVIEW BY THIS COURT.

A. The petition does not present an important but unsettled question of federal law which should be decided by this Court. See Rule 17.1(c).

B. The petition involves no issues of public significance. It merely seeks review of the particular facts that affect the parties' personal interests. See **N.L.R.B. v. Pittsburgh S.S. Co.**, 340 U.S. 498 (1951) (Certiorari should be denied where a new review of evidence is sought).

C. The petition presents problems that are unique to this case and are unlikely to recur frequently.

Petitioner has been able to seize upon the transcript question because an outmoded audio tape system was used in 1979 in the Delaware Family Court. The system was completely replaced in 1980. Modern court administration and equipment both militate against recurrence of courtroom transcription problems.

The bias or prejudice question is often the grievance of an unsuccessful litigant. The Delaware

Supreme Court's public criticism of the trial judge's patience and temperament will certainly have a salutary effect.

CONCLUSION

For the reasons set forth herein, this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Bertram S. Halberstadt
Lindh & Halberstadt
Suite 570
One Customs House Square
Wilmington, Delaware 19801
Attorney for Respondent
Claire A. M.

Dated: June 28, 1982

RESPONDENT'S APPENDIX

QUESTIONS RAISED BY PETITIONER BEFORE THE DELAWARE SUPREME COURT

I. IS A NEW TRIAL REQUIRED BECAUSE THE TRANSCRIPT IS INADEQUATE FOR APPELLATE REVIEW?

II. SHOULD THE FAMILY COURT'S DECISION IN THIS APPEAL BE REVERSED BECAUSE OF THE LOWER COURT'S BIAS AND PREJUDICE?

III. WAS THE LOWER COURT'S DECISION INVALID AS HAVING BEEN MADE IN WHOLE OR IN PART BY AN ILLEGALLY APPOINTED RECEIVER?

IV. SHOULD THE FAMILY COURT'S DIVISION OF PROPERTY BE REVERSED?

V. WAS THE FINDING OF CONTEMPT AND SANCTIONS IMPOSED ON APPELLANT BY JUDGE HORGAN [7 months after the property division trial] IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS?

Source: Petitioner's Opening Brief on Appeal before the Delaware Supreme Court, page 2a.

PROOF OF SERVICE

I hereby certify that all parties required to be served have been served copies of Brief of Respondent in Opposition to Petition for a Writ of Certiorari, that service has been made on petitioner pursuant to Rule 33(1) by personal service, by hand delivery on June 28, 1982 to petitioner's counsel of record: L. Vincent Ramunno, Esquire, Tenth and French Streets, Wilmington, Delaware, 19801.

Bertram S. Halberstadt
Lindh & Halberstadt
Suite 570
One Customs House Square
Wilmington, Delaware 19801
Attorney for Respondent,
Claire A. M.